



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Fraser-Volpe Corporation

File: B-237617

Date: March 12, 1990

David B. Fraser, for the protester.
Edward J. Korte, Esq. and Craig Hodge, Esq., Office of
Command Counsel, U. S. Army Materiel Command, for the
agency.
David Ashen, Esq. and John M. Melody, Esq., Office of the
General Counsel, GAO, participated in the preparation of the
decision.

DIGEST

1. Proposal that took exception to material solicitation requirements properly was found technically unacceptable.
2. Protest alleging defective specifications is untimely where not filed prior to closing date for receipt of initial proposals.

DECISION

Fraser-Volpe Corporation (FVC) protests the rejection of its proposal as technically unacceptable under request for proposals (RFP) No. DAAB07-89-R-F106, issued by the U. S. Army Communications-Electronics Command, for night vision device assessors (NVDA's). An NVDA is a small, hand-held testing device used to evaluate the condition of the image intensifier tube in various night vision devices. FVC claims that the NVDA it proposed, while deviating from certain RFP specifications, overcomes defects in the RFP and therefore should not have been rejected as technically unacceptable.

We deny the protest in part and dismiss it in part.

The solicitation, issued on May 26, 1989, contemplated award to the low-priced, technically acceptable offeror. Seven firms submitted initial proposals by August 9, the amended closing date. Evaluation of the initial proposals ensued. Although FVC's proposal deviated from and challenged the

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specifications in certain respects, it was found to be susceptible of being made acceptable and was included in the competitive range. The Army advised FVC in writing of deficiencies and areas requiring clarification; FVC responded by confirming its intent to deviate from the specifications. Based upon this response, FVC's proposal was determined to be technically unacceptable, and FVC was notified that it was no longer in the competitive range. On October 18, FVC filed an agency-level protest against the specifications and against rejection of its proposal. Upon denial of that protest, FVC filed this protest with our Office.

In its proposal, FVC questioned or took exception to several of the specifications, including the requirements concerning the number of light levels, diopter focus, resolution pattern and logistical support. First, FVC proposed 12 light levels instead of the required 4, claiming that 12 light levels were necessary to properly assess the condition of night vision devices.^{1/} The Army determined, however, that four light levels would enable soldiers to adequately assess a wide variety of night vision devices quickly and easily, while the additional levels proposed by FVC are unnecessary, burdensome and likely would prove confusing to soldiers. Although the Army made clear during written discussions that the requirement for four levels would not be waived, FVC confirmed its intent to deviate from the specification, and claimed the Army had not read its proposal.

Second, the RFP required a focal accuracy of collimation (that is, making a target appear to be at a different distance than it is) of 0 to -0.02 diopters. According to the agency, a -.02 tolerance is necessary to verify the infinity focus on night vision devices. FVC did not meet this requirement; even after the Army explained in an amendment the purpose of the requirement, FVC responded that 0 to -0.02 diopters is too stringent a tolerance to be meaningful, and suggested that FVC and the Army mutually establish a meaningful tolerance after award.

^{1/} FVC's conclusion that 12 light levels were necessary appears to rest upon its assumption that the size and weight limitations in the RFP precluded a large-aperture NVDA. While FVC assumed this was the case, the solicitation did not state a requirement for a small-aperture device, but only acknowledged it as a possible solution. Nothing else in the record supports FVC's assumption.

Third, the RFP specified the use of no more than two "full USAF 1951-type" resolution test patterns. FVC did not meet this requirement, and responded that there is no "standard" USAF 1951 resolution pattern, and maintained that its approach was adequate.^{2/} In addition, FVC's proposal omitted documentation concerning logistics controls, maintenance support, and spare parts from its proposal because the NVDA it offered was a disposable device and therefore would not require repair. However, the Army did not specify a disposable device, and the agency maintains that, even if it had, certain logistical controls omitted by FVC would have been necessary, e.g., providing for the return of defective units, and requisitioning of batteries, caps and other spare parts.

In a negotiated procurement, a proposal that fails to conform to the material terms and conditions of the solicitation is unacceptable and may not form the basis for award. Picker Int'l, Inc., 68 Comp. Gen. 265 (1989), 89-1 CPD ¶ 188. Whether or not there is merit to FVC's technical opinion regarding the best means of specifying the desired NVDA's, the firm's proposal clearly deviated from the material requirements of the solicitation and therefore properly was found technically unacceptable.

Of course, we recognize that the thrust of FVC's protest really has nothing to do with whether the firm's proposal conforms to the requirements as stated in the RFP--FVC concedes that its proposal deviated from those requirements. Rather, it is FVC's position that the Army's specifications are defective in that it is "technically impossible" for NVDA's built to those specifications to perform the required function. This is essentially a challenge to the specifications as stated in the RFP, however, and therefore is an untimely basis of protest.

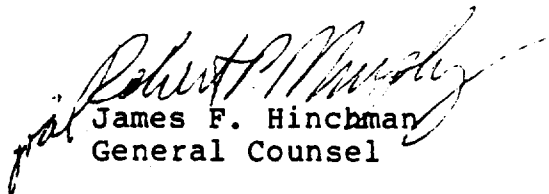
Under our Bid Protest Regulations, protests of alleged deficiencies apparent on the face of a solicitation must be filed prior to the initial closing date for receipt of proposals. 4 C.F.R. 21.1(a)(1) (1989); Picker Int'l, Inc., 68 Comp. Gen. 265, supra. FVC clearly had knowledge of the solicitation requirements when it prepared its proposal, yet did not raise the alleged deficiencies with the contracting officer or our Office before proposals were due. Instead, FVC first disagreed with those requirements in its proposal

^{2/} We note that the literature submitted by FVC to support its allegation that there is no such thing as a "standard" 1951 USAF resolution pattern makes specific reference to a "standard" pattern.

and then did not actually protest the requirements until after discussions had been held--at which time the Army expressly indicated that FVC's proposal did not meet the requirements in question--and its proposal had been rejected. Its protest in this regard therefore is untimely under our Regulations and will not be considered. We note that, even if there were technical merit to FVC's position, FVC's delay in raising this matter deprived the agency of the opportunity to consider and respond to FVC's position before it had accepted other offers.^{3/}

FVC questions whether the agency read its proposal in its entirety and even considered its position. The record clearly shows that the Army considered FVC's proposal and was fully aware of its position regarding the specifications. In its evaluation comments, the technical evaluation panel first noted each of FVC's arguments in support of FVC's deviation from the specifications, and then stated why FVC's position was unreasonable with respect to each. The agency also brought the deviations to FVC's attention during discussions.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel

^{3/} We note that three offerors' proposals were included in the competitive range as conforming to the technical requirements, supporting the Army's position that it is not "technically impossible" to produce an NVDA that conforms with the RFP requirements.